Supreme Court, U.S.
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NO. 88-687

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

LIBERTY LOBBY, INC., Petitioner,

v.

JOHN REES, SHEILA LOUISE REES, and
THE INFORMATION DIGEST, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

In ruling on a motion for summary judgment in a public figure libel case, is the district court bound by a magistrate's comments on the issue of actual malice, when neither the issue nor the proper standard was before the magistrate?

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STATEMENT OF THE CASE

This is yet another action by an "outspoken, often vicious, critic of Jewish groups and leaders," which has frequently resorted to "the use of the libel complaint as a weapon to harass." Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287, 1297 n. 7 and 1303 (D.C. Cir.), cert. denied, _____ U.S. _____, 109 S. Ct. 75 (1988). None of its prior actions has succeeded, and "in no instance has Liberty Lobby been allowed to present its claims to a jury." Id. at 1303 n. 9 (emphasis in original). This case was no exception. Having already failed to present a jury question in actions against the publisher of the Wall Street Journal and the National Review (among others), Liberty Lobby in this

case proceeded against a small-circulation newsletter with fewer than one hundred subscribers and its publishers. It enjoyed the usual result -- a summary judgment entered against it after two years of contentious and costly discovery.

Liberty Lobby's Petition for Certiorari is replete with inaccuracies and omissions, not the least of which involve the Magistrate's Memorandum Opinion. A substantial portion of that opinion has been deleted, without signal or explanation, from Appendix C to the Petition. The entire opinion is reported at 111 F.R.D. 19 (D.D.C. 1986).

The factual and procedural background of this case is accurately portrayed in the careful opinions of the Court of

Appeals (Petition, Appendix A) and the District Court (Petition, Appendix B), to which we respectfully refer the Court. After carefully reviewing the entire record, and considering each of the arguments that petitioner now serves up for the third time, the Court of Appeals concluded that "the absence of sufficient evidence of actual malice is strikingly apparent." Petition, Appendix A-13. The Court of Appeals therefore affirmed the District Court's order granting summary judgment on behalf of the respondents.

ARGUMENT

Like the District Court before it, the Court of Appeals carefully followed the teachings of Anderson v. Liberty Lobby, 477 U.S. 242 (1986), and Bose Corp. v. Consumers Union, 466 U.S. 485

(1984). Properly applying Anderson, the lower courts in this case did not, as petitioner baselessly asserts, weigh the evidence, evaluate the credibility of witnesses, or accept "all inferences in favor of the defendants." Petition at 8. Instead, as Bose requires, and as it had done six months before in Liberty Lobby v. Dow Jones Corp., 838 F.2d at 1293, the Court of Appeals made "an independent examination of the whole record" (Petition, Appendix A-7, quoting Bose and New York Times Co. v. Sullivan, 376 U.S. 254, 284-86 (1964)). Once again the Court of Appeals found that summary judgment against petitioner was compelled, based on an "uncontested showing that the published articles were based on documented

evidence" in other reputable publications. Petition, Appendix A-9.[1] There is no more reason for this Court to review the appellate court's conclusion in this case than there was in the Dow Jones case.

The Court of Appeals correctly disposed of petitioner's principal claim before this Court: that a jury trial was mandated as a matter of law because a U.S. Magistrate, in the course of

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1 Petitioner misleadingly implies that one of these prior publications had been "retracted in full." Petition 8. As the Court of Appeals pointed out, the "retraction" was of a single sentence and did not affect the article's description of Liberty Lobby's ties with Lyndon LaRouche, the subject of the petitioner's libel claim in this case. Petition, Appendix A-13.

resolving a discovery dispute,[2] had expressed the view that there was "substantial evidence to establish knowing falsity or reckless disregard of the truth." Petition, Appendix A-28; 111 F.R.D. at 23. The Magistrate's remark was not intended to preclude the District Court from ruling on a summary judgment motion, nor could it have done so.

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2 The discovery dispute concerned a motion to compel disclosure of a confidential source. The Magistrate denied the motion for many reasons, including that the statement attributed to the source "does not go to the heart of the case"; that disclosure "at most, would involve a collateral matter and result in cumulative evidence" and that counsel for petitioners had offered to stipulate that he would not rely on the source as evidence of truth or lack of malice. 111 F.R.D. at 21-22. Petitioner has deleted this portion of the Magistrate's opinion from its appendix.

First, the Magistrate immediately cautioned that his remark was not intended to "prejudge the merits of the case"; indeed he directed counsel "to proceed with the filing of [any] dispositive motions . . . ." Id. Second, the Magistrate was not authorized to "hear and determine" a summary judgment motion. 28 U.S.C. § 636(b)(1)(A). Third, the Magistrate did not review all of the evidence, ultimately presented to the District Court, showing the respondents' "reliance on previously published sources" (Petition, Appendix A-8), evidence that the District Court and the Court of Appeals found dispositive. Fourth, the Magistrate never purported to apply the constitutional standard, mandated by Anderson v. Liberty Lobby, in summary

judgment cases such as this: "clear and convincing evidence." Finally, no matter how the Magistrate might have viewed the evidence, those views, under Bose, could not affect the obligations of the District Court and the Court of Appeals independently to evaluate the evidence:

> Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."

486 U.S. 485, 511 (1984).

Because the Court of Appeals and the District Court properly performed their constitutional function as judges under Bose and Anderson, petitioner has presented no question worthy of this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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